International Union of Elevator Constructors, Local No. 2 (Unitec Elevator Services Company) *and* Charles Hillstrom. Case 13–CB–16499–1

July 31, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On September 21, 2001, Administrative Law Judge Jerry M. Hermele issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed a brief in support of the judge's decision, and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order[2] as modified and set forth in full below.

We adopt the judge's conclusion that the Respondent Union did not "restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances,"[3] when it initiated discipline against supervisor union member Charles Hillstrom. In doing so, however, we find it unnecessary to decide whether Hillstrom functioned as a representative of the Employer for the purposes of collective bargaining or the adjustment of grievances. Even assuming that Hillstrom was such an employer representative, we agree with the judge that the General Counsel has failed to demonstrate that the Union's initiation of discipline against Hillstrom restrained or coerced an employer within the meaning of Section 8(b)(1)(B).

In *Florida Power & Light Co. v. NLRB*, 417 U.S. 790, 804–805 (1974), the Supreme Court created an "adverse-effect" test to determine when union discipline of a supervisor-member violates Section 8(b)(1)(B). The Court held that a union's discipline of a supervisor-member can constitute a violation of Section 8(b)(1)(B) only when that discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer. Id. at 804–805; *American Broadcasting Cos. v. Writers Guild West, Inc.*, 437 U.S. 411, 430 (1978); *NLRB v. Electrical Workers Local 340*, 481 U.S. 573, 581–585 (1987). The Court reasoned that in those circumstances, "the employer would be deprived of the full service of his representatives and hence would be restrained and coerced in his selection of those representatives," within the meaning of Section 8(b)(1)(B). *American Broadcasting*, supra, 437 U.S. at 429. However, if the discipline has no impact on any supervisor members' performance of covered functions, the employer has not been deprived of the full services of its representatives and hence has not been restrained or coerced in its selection of those representatives. Accordingly, before a violation of Section 8(b)(1)(B) based on union discipline of a supervisor member can be found, the Board must make a finding that the discipline will adversely affect supervisor members' performance of collective bargaining or grievance adjusting duties. *American Broadcasting*, supra, 437 U.S. at 430; *Electrical Workers Local 340*, supra, 481 U.S. at 585.

In the case at hand, the record fails to establish that the disciplinary proceedings begun against Hillstrom will adversely affect supervisor members' performance of collective bargaining or grievance adjusting duties.[4] At the time the Union initiated disciplinary proceedings against him, Hillstrom had ceased working for the Employer, and there has been no showing that he functioned as a grievance adjuster or collective bargainer on behalf of his subsequent employer, Otis Elevator. It is arguably true that the Union's postemployment discipline of Hillstrom might cause *other* representatives of the Employer or Otis Elevator to fear postemployment union discipline and that this fear might adversely affect their performance while still employed. But even assuming this possibility properly could be considered, the General Counsel has not shown that either of those employers have other supervisor-members who function as 8(b)(1)(B) representatives. Nor has the General Counsel shown that the Employer, Otis Elevator, or the Union's supervisor-

[1] No exceptions were filed to the judge's finding that the Respondent Union violated Sec. 8(b)(1)(A) by maintaining, in conjunction with a collective-bargaining agreement containing a union-security clause, a provision in its constitution and bylaws requiring the payment of members' fines before dues or before procuring a current working card.

[2] We shall modify the judge's recommended Order to omit the requirement related to notice mailing in the event that the Employer or the Respondent Union goes out of business or closes the facility involved in this proceeding. See, e.g., *L.D. Kichler Co.*, 335 NLRB 1427 fn. 2 (2001). Consistent with the Board's standard remedial practice, the recommended Order is further modified to require the Respondent to provide sufficient copies of the notice to the Regional Director for Region 13 for posting by the Employer, if willing, and to require the Respondent, within 21 days after service by the Region, to file with the Regional Director a sworn certification of a responsible official attesting to the steps the Respondent has taken to comply with the Order.

We shall substitute a new notice in accordance with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

[3] 29 U.S.C. § 158(b)(1)(B)

[4] Upon finding that Hillstrom was a supervisor, the Union withdrew its charges against him.

members who function as 8(b)(1)(B) representatives (assuming there are any), knew of the Union's initiation of disciplinary proceedings against Hillstrom. Absent such knowledge, they could not have been coerced by the disciplinary proceedings. Finally, we recognize the possibility that, at some unknown future date: (1) the Employer or Otis Elevator might employ supervisor members as 8(b)(1)(B) representatives; (2) those supervisor members might learn of the Union's initiation of disciplinary proceedings against Hillstrom in July 2000; and (3) this knowledge might have an adverse effect on their performance of collective bargaining or grievance adjusting duties. However, these matters are simply too speculative to support a finding that these employers have been restrained or coerced in the selection of their representatives within the meaning of Section 8(b)(1)(B). Accordingly, within the specific facts of this case, we agree with the judge that the Union's disciplinary proceeding at issue herein was not violative of Section 8(b)(1)(B).

ORDER

The National Labor Relations Board orders that the Respondent, International Union of Elevator Constructors, Local No. 2, Chicago, Illinois, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Maintaining, in conjunction with a collective-bargaining agreement containing a union-security clause, any provision in its constitution and bylaws requiring the payment of members' fines before dues or before procuring a current working card.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the provision regarding payments of fines at pages 38, 42, and 49 of the local union's constitution and bylaws.

(b) Within 14 days after service by the Region, post at its office and meeting hall copies of the attached notice marked "Appendix A."[5] Copies of the notice on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material.

(c) Sign and return to the Regional Director for Region 13 sufficient copies of the notice for posting by Unitec Elevator Services Company, if willing, at all places where notices to employees are customarily posted.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations not specifically found.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain, in conjunction with a collective-bargaining agreement containing a union-security clause, any provision in our constitution and bylaws requiring the payment of members' fines before dues or before procuring a current working card.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the provision regarding payments of fines at pages 38, 42, and 49 of our constitution and bylaws.

INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, LOCAL NO. 2

[5] If this Order is enforced by judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an order of the National Labor Relations Board."

David Huffman-Gottschling, Esq., for the General Counsel.
David Matthews, Esq. (Carmell Charone Widmer Mathews & Moss), of Chicago, Illinois, for the Union.
Eugene K. Hollander, Esq., of Chicago, Illinois, for Charles Hillstrom.

DECISION

I. STATEMENT OF THE CASE

JERRY M. HERMELE, Administrative Law Judge. In a December 28, 2000 complaint, the General Counsel alleges that the Respondent, International Union of Elevator Constructors, Local No. 2 (the Union), violated Section 8(b)(1)(A) of the National Labor Relations Act by requiring that its members pay union-imposed fines before dues, and violated Section 8(b)(1)(B) by interfering with the employer's selection of union member Charles Hillstrom as its representative for the purpose of collective-bargaining or grievance adjustments. In a February 6, 2001 answer, the Union denied both of these allegations.

This case was tried on June 11, 2001, in Chicago, Illinois, at which time each party called one witness: Charles Hillstrom testified for the General Counsel and Robert Shanklin testified for the Union. Then, on July 12, 2001, Hillstrom filed a written brief,[1] followed by the General Counsel and the Union on July 13.

II FNDINGS OF FACT

Charles Hillstrom, the Charging Party, worked for Automatic Elevator Company (AEC) for approximately 30 years, including after June 1, 1999 when Unitec Elevator Services Company (Unitec) purchased the assets and name of AEC. The Companies, located in Des Plains, Illinois, have installed, serviced, and repaired elevators in the Chicago area, with annual interstate purchases and receipts of over $50,000 (GC Exh. 1(g)(i); Tr. 10–11). From June 1 to the end of 1999, Hillstrom oversaw the transition of the companies, and continued to manage the successor company's 20 union employees, as he had done with AEC (Tr. 12, 14–15, 36). Those employees have been represented by the International Union of Elevator Constructors, Local No. 2, whose jurisdiction covers Chicago, its suburbs, and parts of Indiana and Wisconsin. The Union had approximately 1650 members including Hillstrom (Tr. 17, 67). In mid-1999 it entered into a collective-bargaining agreement with Unitec's subsidiary, ACM Elevator Company, the most recent of many such agreements (Tr. 58–59).

According to Hillstrom, he was responsible for dealing with the Union and representing AEC regarding the adjustment of grievances. However, from 1955 to June 1999, the Union never filed a written grievance. Nevertheless, Hillstrom handled three "verbal grievances" during his tenure with the Company. First, in either 1997 or 1998, Hillstrom had to locate a missing union member who was scheduled to work on a subcontracted job. Hillstrom did this after being told to do so by the Union's business agent. Second, he sent a welder he had hired to the union hall, at the request of Robert Shanklin, the Union's business representative, to get a $35 permit. Finally, he fired the company owner's son, pursuant to the owner's request, after checking with a union official about either firing this individual outright or attempting to document poor work performance (Tr. 17–24, 60). Hillstrom left his position at the end of 1999 to work for another Unitec subsidiary, Otis Elevator, "[t]o get the management insignia off my Union card" (Tr. 10, 13–15, 52).

In July 2000, Shanklin filed five internal union charges against Hillstrom for offenses allegedly committed prior to February 1, 2000, while Hillstrom was employed by AEC. The offenses read as follows:

> Brother Hillstrom instructed co-workers to violate various Articles of the Standard Agreement & International constitution & By-Laws and on occasion threatened members if they questioned his instructions.
>
> During his employment at Automatic Elevator Co., Brother Hillstrom worked with and directed others to work with a non I.U.E.C. member, violating I.U.E.C. Constitution & By-Laws Article XIII, Sec. 4.
>
> During his employment for Automatic Elevator Co., brother Hillstrom directed helpers to do mechanic work for helpers wages, violating Article IV, Paragraph 1 of the Standard Agreement.
>
> Brother Hillstrom by word and deed during his tenure at Automatic Elevator Co. violated various Articles and Sections of our Standard Agreement and Constitution & By-Laws.
>
> During his employment for Automatic Elevator Co., Brother Hillstrom directed helpers to do mechanic work for helpers wages, violating Article X, Paragraph 1, 2, 4 of the Standard Agreement.

(GC Exh. 2) Hillstrom's liability for each of these five charges was $2000 (Tr. 28). According to Shanklin, he filed these charges because he heard that Hillstrom abused the employees and violated the collective-bargaining agreement. But Shanklin testified that he was unaware if Hillstrom was a part of management (Tr. 70–71). Hillstrom offered to pay $10,000, to be contributed by AEC's owner, Frank Wikowski, to settle the matter but the Union rejected his offer (Tr. 11, 30–31).

The Union then conducted a trial on September 20, 2000, and notified Hillstrom of its decision on November 21, 2000. Hillstrom was found to be a supervisor at the time the alleged offenses were committed but all charges were found null and void (GC Exh. 4). However, there were consequences to his union membership as a result of this decision, First, Hillstrom was barred from attending union meetings and voting. Second, his union pension credit was reduced to 50 percent. And third, after retirement he would no longer be eligible for health benefits (Tr. 34). On October 5, 2000, while awaiting the Union's decision, Hillstrom filed a charge against the Union, with the Board, alleging various violations of Section 8(b) of the Act (GC Exh. 1(a)).

The collective-bargaining agreement between the International Union of Elevator Constructors and the National Elevator Industry, Inc., which runs from July 9, 1997 to July 8, 2002, provides that all mechanics and helpers "shall, as a condition of employment obtain and maintain membership in a local union of the International Union of Elevator Constructors on and after

[1] Although Hillstrom's lawyer filed a brief, he did not appear at the trial.

the thirtieth (30th) day following the beginning of their employment" (GC Exh. 6). Yet Local 2's Constitution and By-Laws, revised in March 1995, provide that "[a]ll fines imposed, assessments or late charges levied shall be charged by the Business Representative/Financial Day Secretary to the member and shall stand and be payable before dues." (GC Exh. 5, p. 38), and that "[a]ll assessments and fines must be paid in full before procuring current working card" (id. at p. 42). And they further require that "International and Local assessments, disciplinary fines or assessments are payable before dues" (id. at p. 49). But the International Union Constitution and By-Laws provide that:

> International and local assessments, disciplinary fines on assessments and loans are payable before dues. However, no union security clause shall be enforced or given affect because of the failure to pay International and local assessments, disciplinary assessments or loans pursuant to this provision.

(R. Exh. 3, pp. 38–39). In the spring of 2001, the local Union amended its Constitution and By-Laws so that fines would no longer have to be paid before dues, and all members were notified of the change by mail. Although the old provision was never enforced, Shanklin knew that it violated the Act (R. Exh. 4; Tr. 61–64, 78–80).

III. ANALYSIS

The General Counsel alleges that the Union violated two provisions of Section 8(b) of the Act. Turning first to the alleged 8(b)(1)(A) violation, it is clear that the local union required the payment of fines before dues in connection with a union-security clause requiring membership in the Union. This combination thus constitutes a clear violation of the Act. *Teamsters Local 287 (Airborne Express)*, 307 NLRB 980 (1992), citing *Elevator Constructors Local 8 (San Francisco Elevator Co.)*, 243 NLRB 53 (1979), enfd. 665 F.2d 376 (D.C. Cir. 1981). And the fact that the Union never enforced these provisions does not excuse the violation. *Teamsters Local 287*, supra. Moreover, the existence of a savings clause in the International Union's constitution that set aside any local provisions conflicting with the International Union's Constitution is irrelevant because the local constitution did not refer to this clause. *Teamsters Local 287*, supra, at 981. Lastly, although these unlawful provisions were repealed in 2001, the local union failed to repudiate its unlawful conduct in a timely, unambiguous, and specific fashion, nor did it assure its members there would be no future interference with their Section 7 rights. See *Passavant Memorial Area Hospital*, 237 NLRB 138, 138–139 (1978). Therefore, the local Union will be required to rescind the offensive provisions again and to post an appropriate remedial notice.

The General Counsel's second allegation concerns Section 8(b)(1)(B) of the Act, which makes it an unfair labor practice for a union "to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." This section prohibits a union from disciplining a member, who also works as a supervisor for an employer, when such discipline may adversely affect the supervisor's future conduct in performing collective bargaining, grievance adjustment, or some other closely related activity. *Steelworkers Local 1013 (USX Corp.)*, 301 NLRB 1207 (1991). Here, it is clear that Charles Hillstrom functioned as a supervisor within the meaning of Section 2(11) of the Act for AEC and its successor. But in order to trigger a violation of Section 8(b)(1)(B), that supervisor must actually engage in collective bargaining or grievance adjustment. *NLRB v. Electrical Workers Local 340*, 481 U.S. 573 (1987). Nothing in the record, however, suggests that Hillstrom was ever engaged in collective bargaining for AEC or its successor. Therefore, the critical question is whether Hillstrom actually engaged in contract interpretation or grievance adjustment during his long tenure with the employer which ended in 1999, prior to the 2000 union charges against him.

Although AEC had a long-term collective-bargaining agreement with the Union, until June 1999 when it was acquired by Unitec, the record shows that AEC apparently enjoyed an idyllic relationship with the Union. In short, for nearly 45 years, no written grievances were ever filed against the Company. Rather, Hillstrom testified as to only three "oral grievances." The first so-called grievance concerned the presence of a unit employee on standby at a site while a subcontractor worked. Hillstrom's sole involvement was to radio the assigned "standby" and inform him that he had to make himself visible to the union representative who visited the worksite. Second, Hillstrom was notified by the Union's business representative that a certified welder hired by AEC was working without a permit. So, Hillstrom had an employee pick up a $35 permit from the Union. Third, Hillstrom terminated an employee, the boss' son, after consulting with the Union's business manager regarding that employee's rights. It is true that Hillstrom was the only supervisor on the job full time and therefore the only employer representative available to resolve grievances of any kind. Moreover, the Board has held that supervisors may be considered grievance adjusters under Section 8(b)(1)(B) even when they have not been involved in formal disputes. See *Elevator Constructors Local 36 (Montgomery Elevator)*, 305 NLRB 53 (1991); *Sheet Metal Workers Local 68 (DeMoss)*, 298 NLRB 1000 (1990). But the General Counsel has failed to point to any specific provision of the collective-bagaining agreement requiring "interpretation" by Hillstrom. Also, none of Hillstrom's three cited "grievances" involved a specific complaint lodged by an employee. Nor did any of these matters concern such traditional terms and conditions of employment such as pay disputes, safety matters, job assignments, overtime, or employee misconduct. See *Steelworkers Local 1013*, supra at 1210. In sum, Hillstrom's role in these three matters constituted nothing more than examples of his exercise of supervisory authority. See *Masters, Mates & Pilots (Marine Transport)*, 301 NLRB 526, 528 (1991). Thus, it is concluded that Hillstrom possessed neither of the requisite job duties set forth in Section 8(b)(1)(B).

Furthermore, the Union's motive in filing internal charges against Hillstrom must be considered. A union violates Section 8(b)(1)(B) when it files charges against a supervisory member with the intent of influencing or coercing an employer's choice of a representative for the purpose of collective bargaining or adjusting grievances. Thus, the timing of the Union's August

2000 charges against Hillstrom must be considered. In this regard, the General Counsel has failed to establish that Hillstrom was employed as a supervisor at that time for Otis Elevator. Moreover, it is unclear what relationship, if any, Otis Elevator had with AEC or its successor. Thus, if the Union's intent was to launch a campaign to influence the employer's selection of a representative for the purpose of collective bargaining and grievance adjustment, against some unspecified employer, it chose an ineffective weapon in Hillstrom. Accordingly, the nexus between the Union's discipline of Hillstrom and any potential adverse effect on the employer is too attenuated to support a violation of the Act. See *Florida Power & Light Co. v. Electrical Workers*, 417 U.S. 790 (1974).

CONCLUSIONS OF LAW

1. The Respondent, International Union of Elevator Constructors, Local No. 2, is a labor organization within the meaning of Section 2(5) of the Act.

2. Automatic Elevator Company and its successor, Unitec Elevator Services Company have been employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. The Respondent violated Section 8(b)(1)(A) of the Act, as alleged in paragraphs 7 and 9 of the General Counsel's complaint.

4. The Respondent did not violate Section 8(b)(1)(B) of the Act, as alleged in paragraphs 6 and 10 of the complaint.

5. The unfair labor practice of the Respondent, described in paragraph 3, above, affects commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

[Recommended Order omitted from publication.]